

## **REG 35-111 PROCEDURE FOR PROCEEDING BEFORE THE STATE TAX COMMISSIONER**

111.01 Scheduling of hearings. The time and place of any hearing shall be set by the State Tax Commissioner or his or her authorized representative after proceedings have commenced. The hearing shall be scheduled as soon as practicable. Written notice of the time, date, and place of any hearing shall be given at least ten (10) days prior to the date of hearing unless notice is waived by the parties.

### 111.02 Motions:

111.02A General form and procedure. Motions may be filed with the State Tax Commissioner by any party or upon the State Tax Commissioner's own motion as soon as either party becomes aware of facts requiring the motion. The motion must state specifically the facts as to why it is necessary. If the motion is made orally, the State Tax Commissioner may request that it be reduced to writing and filed with the Department. To avoid a hearing on the motion, it is advisable to secure the consent of the opposing party prior to filing a motion. If consent of the opposite party to the motion is not obtained, a hearing on the motion will be scheduled and the parties notified. The burden will be on the party filing the motion to show good cause why the motion should be granted. Notice will be given to all parties of the ruling of the hearing officer on the motion.

111.02B Types of motions. Types of motions which may be made by either party include, but are not limited to:

111.02B(1) Motion for continuance.

111.02B(2) Motion for dismissal, which may be made on the following grounds for:

111.02B(2)(a) Lack of jurisdiction including, but not limited to, whether the petitioner is the proper party in the proceeding, whether there was a deficiency determination, or whether the protest petition was filed within the statutory time limit,

111.02B(2)(b) Failure of a party to state a cause of action,

111.02B(2)(c) Failure of a party to comply with these practice and procedure regulations.

111.02B(3) Motion for default judgment may be filed and may be sustained whenever the party having the burden of proof fails to appear at a hearing,

111.02B(4) Motion for consolidation may be made in the following instances:

111.02B(4)(a) The same taxpayer has received separate deficiency notices relating to different taxable periods or organizations and, instead of contesting them in one petition at the outset, has filed a separate petition for each notice.

111.02B(4)(b) Different taxpayers receiving deficiency notices

based on the same general issues may request consolidation of the cases, especially if they are represented by the same attorney or accountant. Even where separately represented, they may, by agreement, request consolidation of the cases.

111.02B(4)(c) Different licensees have received separate suspension, cancellation or revocation notices on substantially similar grounds.

111.02B(4)(d) Different licensees have received separate cease and desist orders issued by the State Tax Commissioner on substantially similar grounds.

111.02B(4)(e) Different licensees under the Nebraska Pickle Card Lottery Act have received separate notices of the Department's intent to impose an administrative fine for violations of the Act on substantially similar grounds.

111.02B(4)(f) Different license applicants have received notices of intended license denial on substantially similar grounds.

111.03 Oath. All testimony presented before the hearing officer shall be given under oath which the hearing officer will have the authority to administer.

111.04 Production of evidence and testimony. The hearing officer may issue subpoenas, as permitted by law, compelling the attendance of witnesses and the production of records, papers, books, accounts and documents, and cause the taking of depositions in accordance with district court rules.

111.04A Subpoena, in general. When a subpoena is desired to effectuate discovery or to compel testimony at a hearing, the proper parties shall indicate to the hearing officer the name of the case and the names and last known addresses of the witnesses to be called. If evidence other than oral testimony is required, each item to be produced must be adequately described. When properly prepared, the subpoena will be returned to the requesting party for service. Service may be made either by mailing a copy thereof by certified mail, return receipt requested, not less than six (6) days before the hearing date of the cause which the witnesses are required to attend or, personally, by any person not interested in the action.

111.05 Admissibility of evidence.

111.05A Evidence having probative value. The hearing officer may admit evidence which possesses probative value commonly accepted among reasonably prudent men in the conduct of their own affairs. Incompetent, irrelevant, immaterial and unduly repetitious evidence may be excluded. If a party requests the Nebraska Rules of Evidence in use in the District Courts of this state be used at hearing, those rules shall govern the admission of evidence at that hearing. Such request shall be made in writing, and filed with the Department of Revenue at least three (3) days in advance of hearing before the State Tax Commissioner.

111.05B Evidence of a federal determination. Evidence of a federal determination whether it be a Treasury Department ruling or regulation or determination letter, a federal court

decision, or an Internal Revenue Service assessment relating to issues raised in the proceeding shall be presumed accurate unless the petitioner can show specifically wherein it is erroneous.

111.05C Copies as evidence. A copy of any book, record, paper or document may be offered directly in evidence in lieu of the original, where the original is unavailable or where there is no objection and where the original is admitted into evidence, a copy may be substituted later for the original or such part thereof as may be material or relevant upon leave granted in the discretion of the hearing officer.

#### 111.06 Exhibits.

111.06A Identification of exhibits. Exhibits attached to a stipulation or entered into evidence which are offered by the petitioner shall be numbered serially, i.e., 1, 2, 3, etc.; whereas those offered by the Nebraska Department of Revenue shall be lettered serially, i.e., A, B, C, etc.; and those offered jointly shall be numbered and lettered i.e., 1-A, 2-B, 3-C, etc.

111.06B Disposition of exhibits. After a Findings and Order has become final, either party desiring the return, at his or her own expense, of any exhibit belonging to him or her shall make application in writing to the hearing officer within thirty (30) days suggesting a practical manner of delivery; otherwise, exhibits may be disposed of as the hearing officer deems advisable.

111.07 Official notice of evidence. The hearing officer may take notice of judicially recognizable facts and of general, technical or scientific facts within the specialized knowledge of the State Tax Commissioner's office. Parties to a proceeding shall be notified either before or during the hearing of the facts so noticed and shall be afforded an opportunity to contest such facts.

111.08 Evidence outside the record. Except as provided by these practice and procedure regulations, the hearing officer will not consider factual information or evidence in the determination of any proceeding unless the same shall have been offered and made a part of the record in the proceeding.

#### 111.09 Presentation of evidentiary testimony.

111.09A Presentation. At any hearing, every party thereto shall have the right to present evidence and testimony of witnesses and to cross-examine any witness who testifies on behalf of an adverse party. Opportunity shall be afforded every party to present evidence and testimony as rebuttal to evidence presented by another party, except that repetitious evidence shall be excluded.

111.09B Rules of evidence. Any party may request that the proceedings be bound by the rules of evidence applicable in a District Court of Nebraska. Such party shall file with the hearing officer, at least three (3) days prior to the date of the scheduled hearing, a written request that the hearing be so conducted. A request for the application of District Court rules of evidence shall be in writing and include an agreement by the requesting party that he or she shall pay the cost incurred by the request if a final decision is rendered against the requesting party. All costs of a formal hearing except as set forth below, shall be paid by the party or parties against whom a final decision is rendered. The party requesting the District Court rules of evidence may procure at his or her own cost and on his or her own initiative

the court reporting services for the hearing.

111.10 Conduct of hearing. A hearing shall be conducted by a hearing officer who, among other things, will open the proceedings, take appearances, administer oaths and subpoena witnesses; hear the evidence and rule on the motions and objections; interrogate witnesses; and close the proceedings. If the petitioner, licenseholder, or permitholder is not represented by anyone qualified to make an appearance, the hearing officer shall explain to the petitioner, licenseholder or permitholder the rules of practice and procedure and shall generally conduct a hearing in a less formal manner than that used when a petitioner, licenseholder, or permitholder has a representative qualified to appear. It should be the purpose of the hearing officer to assist any petitioner, licenseholder, or permitholder who appears without such a representative to the extent necessary to allow him or her to fairly present his or her evidence, testimony, and arguments on the issues.

111.11 Arguments as to law. The parties should be prepared to make oral arguments as to the law at the conclusion of a hearing. A written memorandum of law may be filed at the time of the hearing at the discretion of any party or at a subsequent time if the hearing officer so directs.

111.12 Records. The petitioner, licenseholder, or permitholder may request and obtain a certified copy of the record of the hearing. Charges for preparing the certified copy of the record shall be paid by the party requesting it. Testimony in any hearing may be taken by tape-recording. The official record will consist of exhibits and transcription of said recording, except where a party has requested that the district court rules of evidence apply to the hearing.

(Sections 9-418, 9-420, 9-421, 9-612, 77-369, 77-2709(8), 84-909, 84-913, 84-914, and 84-915, R.R.S. 1943. Sections 9-226, 9-228, 9-229, 9-322, 9-324, 9-325, R.S.Supp., 1988. January 3, 1990.)